

ABSTRACT

Reconciling Policy with Reality: Applying a Commonsense Interpretation of “Existing Use” for Recreation in a CSO-Impacted Urban Watershed

By

Jodi Perras, Deputy Director for Policy and Planning,
Indianapolis Department of Public Works

Rosemary G. Spalding, J.D., Legal Counsel to the City of Indianapolis

Robert J. Masbaum, P.E., Indianapolis Department of Public Works

Scott T. Girman, P.E., Greeley and Hansen

The City of Indianapolis supports and upholds the principles underlying the Clean Water Act, including the antidegradation principle and the need to provide the greatest protection to existing uses of the nation’s waterways. EPA’s July 31, 2001, guidance document – Coordinating CSO Long-Term Planning with Water Quality Standards Review – specifically addresses the integration of “water quality standards reviews, implementation of high-priority CSO controls, and development of well-designed and operated LTCPs that support attainment of water quality standards without causing substantial widespread economic and social impacts.”

Indianapolis is preparing a Long-Term Control Plan to address long-standing CSO problems, and an accompanying Use Attainability Analysis (UAA). The UAA will seek to demonstrate that any remaining CSO discharges will contribute to violations of water quality standards for bacteria, and that complete elimination of those discharges will cause widespread economic and social impacts on the community. Through the UAA, we will be proposing a temporary suspension of the designated full-body recreational use on CSO-impacted streams during and after wet-weather events.

As stated in EPA’s Policy, “[a] state may remove a designated use from its water quality standards only if the designated use is not an existing use.” An existing use is a use actually attained in the water body on or after November 28, 1975, whether or not they are included in the state’s water quality standards. However, the term “actually attained” is not defined.

How should the City of Indianapolis and the State of Indiana determine whether a use has been “actually attained?” Urban waterways typically flow through residential neighborhoods and near parks, playgrounds and schools. We know that children wade, play and occasionally swim in some CSO-impacted streams. Is actual or occasional use of these waterways automatically an “existing recreational use?” In an urban watershed, we believe a number of factors should be considered in making this determination. These include the following:

- Is the water quality and hydrology of the streams conducive to full-body contact recreation?

- Are there physical barriers making it difficult for people to access the stream?
- Is swimming or other full-body contact recreation specifically authorized or enabled by the city (e.g., does the waterway contain public beaches with lifeguards)?
- Does the city discourage contact with sewage-contaminated waterways through warning signs or other public education programs?
- How frequent and widespread are any unauthorized recreational uses of an urban stream?

We believe the City of Indianapolis can provide public health and environmental protection without the astronomical costs and economic disruption associated with eliminating CSOs. However, this will depend upon a common sense interpretation of “existing use.”

EPA’s guidance documents do not directly address this issue. However, a review of pertinent EPA materials and guidance documents indicates that the City’s position is supportable and within applicable regulations and policy. This presentation will outline the relevant legal and policy considerations and will propose a commonsense approach that balances the environmental, health and safety, and economic and social considerations associated with this issue.